Supreme Court, U.S.
FILED

95-747 OCT 10 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

BILL MISURA,

Petitioner,

v.

COUNTY OF EL DORADO, on behalf of JOHNNY FLETCHER WOODS, a minor child,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

I. WHETHER CALIFORNIA FAMILY CODE § 7555 VIOLATES SUBSTANTIAL DUE PROCESS AND IS THEREFORE UNCONSTITUTIONAL.

II. WHETHER AS APPLIED IN THIS CASE CALIFORNIA FAMILY CODE § 7555 IS UNCONSTITUTIONAL.

III. WHETHER AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL SECTION 7555 IS REALLY A CONCLUSIVE PRESUMPTION, AND THUS, VIOLATES DUE PROCESS.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BILL MISURA, respectfully prays that a Writ of Certiorari issue to review the decision of the California Court of Appeals, entered in this case on March 15, 1995.

OPINIONS DELIVERED IN THE CASE

1. The decision of the Court of Appeals of the State of California, Third Appellate District filed March 15, 1995 and modified April 11, 1995, is reprinted in full in the appendix hereto at App. 1 & App. 22.

2. The Statement of Decision of the Superior Court of the State of California, in and for the County of Placer, filed October 26, 1993, is reprinted in full in the appendix hereto at App. 24.

3. The California Supreme Court's Denial of the Petition for Review, July 13, 1995, is reprinted in full in the appendix hereto at App. 26.

STATEMENT OF JURISDICTION

This court has jurisdiction to review the California Court of Appeals' decision pursuant to 28 U.S.C. § 1254 (1).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment To The United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or Property, without due Process of law . . .

5th Amendment To The United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATUTES INVOLVED

California Family Code § 7555 provides:

> **Rebuttable presumption of paternity; paternity index of 100 or more.**
>
> (a) There is a rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater. This presumption may be rebutted by a preponderance of the evidence.
>
> (b) As used in this section:
>
> (1) "Genetic markers" mean separate genes or complexes of genes identified as a result of blood tests.
>
> (2) "Paternity index" means the commonly accepted indicator used for denoting the existence of paternity. It expresses the relative strength of the test results for and

> against paternity. The paternity index, computed using results of various paternity tests following accepted statistical principles, shall be in accordance with the method of expression accepted at the International Conference on Parentage Testing at Airlie House, Virginia, May, 1982, sponsored by the American Association of Blood Banks.

California Family Code § 7554 provides:

> **Determination of paternity.**
>
> (a) If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly.
>
> (b) If the experts disagree in their findings or conclusions, or if the tests show the probability of the alleged father's paternity, the question, subject to Section 352 of the Evidence Code, shall be submitted upon all the evidence, including evidence based upon the tests.

STATEMENT OF THE CASE

Plaintiff COUNTY OF EL DORADO filed a complaint in the El Dorado County Superior Court December 16, 1988 against petitioner herein BILL MISURA to establish paternity, obtain reimbursement of public assistance, and establish a child support order, of a child born in 1982, more than 6 years prior.

Respondent filed his answer February 22, 1989 denying all allegations contained in appellant's complaint.

The parties stipulated July 12, 1991 to an order for blood testing, appointment of expert, and apportionment of costs. The blood tests included human leukocyte antigen (HLA) white blood cell and extended red cell testing. The tests were done by Fong Diagnostic Laboratories, now known as Meris Laboratories.

The Superior Court for the County of El Dorado granted respondent's motion for change of venue July 27, 1992. The court ordered the case transferred to the County of Placer.

The case was set for a non-jury trial October 25, 1993. Trial was held October 25, 1993 in the Placer County Superior Court before the Honorable Larry D. Gaddis, judge presiding. Petitioner was found not to be the father and the petition was dismissed. The county appealed. The appellate court reversed March 15, 1995. The California Supreme Court declined to hear the case July 13, 1995. Justices Mosk and Kennard voted to grant hearing.

During the time of conception, Ms. Campbell, the mother, was involved in casual sexual relationships with at least four different men. (R.T. 7, 8, 14, 15, 18, 19, 20-24, 26-28, 34 & 36.) During the period of conception, she had sexual relationships with a Mr. John Utley, a Mr. Bill Krueger, petitioner, and a fourth individual, whom she refused to identify beyond his first name of Steve. (R.T. 7, 14, 15, 18, 34 & 36.) It is not clear that these four people are the total universe of men with whom she was having sexual intercourse during the period of conception. Ms. Campbell had been a drug abuser, and her memory of these times, and of the people with whom she had sex,

was somewhat vague. (R.T. 18, 29; see also App. 42.) Neither Mr. Krueger, nor "Steve" were ever tested.

Over the years, Ms. Campbell made numerous contradictory statements under oath about the identity of the father of her minor child. In a prior unsuccessful paternity action relating to the same child that she brought against Mr. Utley, she stated that she was 100% certain that John Utley was the father of her child, and that no one else was possible, because she had slept with no one else. (R.T. 26 & 27.)

Dr. Julita Fong of Meris Laboratories (formerly Fong Diagnostic Laboratories) testified as to the blood test results of samples obtained from Ms. Campbell, the minor, and respondent. Dr. Fong testified that three blood tests were run. Two of the results permitted Mr. Misura to be included as a possible father, one conclusively excluded him. (R.T. 63.) Such conflicts are not unusual in paternity blood testing. (R.T. 63 & 64.) Dr. Fong testified that in her best medical opinion, defendant had a 66 2/3% chance of having the B18 factor in the HLA system. It is necessary that the father of the minor child at issue have B18. (R.T. 49, 50 & 53.)

In order to compute the California paternity index, Dr. Fong entered a 100% probability that Mr. Misura had B18 into a formula known as Bayes' theorem and computed the paternity index.

Dr. Fong was cross-examined extensively about this computation. The calculation of the paternity index contains no provisions for less than certainty about the existence of any necessary gene. Dr. Fong explained that the calculation would compute a paternity index of zero if

anything less than a 100% probability was entered into the equation. She had no way to employ the probability she actually found, 66 2/3%, so she used 100%, knowing it was inaccurate.

The trial court issued its Statement of Decision October 26, 1993 noting that while the paternity presumption had arisen, it had been rebutted. The trial court found non-paternity, and dismissed the complaint.

Plaintiff filed its Notice of Appeal November 18, 1993. The Court of Appeal reversed. The appellate court issued its opinion March 15, 1995, and filed a modification April 11, 1995, finding the presumption of paternity was triggered, and the evidence was insufficient to rebut that presumption. The Court of Appeal stated that the test excluding Mr. Misura was in error. No such evidence had been presented, and in fact, Dr. Fong testified it was perfectly valid. (R.T. 67.)

Since an understanding of paternity testing is necessary, the following description is offered as a condensed summary of the procedure.

In a typical blood testing for paternity, several red blood cell tests are used, as well as one on the white blood cells. The latter is called the Human Leukocyte Antigen (HLA) test. Usually the HLA alone yields far more information, and contributes more to the statistical results, than all the others combined. (Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, (1976) 10 Fam.L.Q. 247 (hereafter Guidelines).) Two HLA gene locations are usually tested. These are designated A and B. The child will have two genes of each. (Peterson, A Few Things You Should

Know About Paternity Tests (But Were Afraid To Ask) (1982) 22 Santa Clara L. Rev. 667.) One gene at the A locus and one at the B are contributed each by the mother and the father.

The mother's HLA contribution to the child is determined after testing the known mother and child. From this determination, the father's HLA contribution to the child is deduced. (Peterson, supra 22 Santa Clara L. Rev. 667.) The putative father is then tested for the remaining HLA genes inherited by the child. A putative father who does not have one or both of the HLA antigens required to be the father of the child in question is excluded as the father. A man who has both genes is not necessarily the real father. (Guidelines.) In practice, the computation virtually implies he is. The guidelines provide that once it is determined that a man has both genes, that information is used in conjunction with, among other factors, the racial and geographic origin of the subjects to calculate the statistical likelihood that the accused man is the real father. (Guidelines.) These latter factors were not included in the calculation made in this case, nor in any case of which this author is aware.

The paternity index is the probability (expressed as a ratio) that the accused man is the biological father *COMPARED TO A RANDOM MAN*. It is not the actual probability the accused is the father. (Peterson, supra, 22 Santa Clara L. Rev. 667.) This probability is calculated using what is commonly known as Bayes' theorem. Bayes' theorem is a mathematical expression of the odds that the posed theory is correct. The formula requires the inclusion of "prior odds" which are generally unknown in paternity calculations. Thus, in calculating paternity

probabilities a random man is used to depict 50% (or 1:1) prior odds that the accused man is the true father, regardless of the circumstances of the particular case. (Peterson, supra, 22 Santa Clara L. Rev. 667; See also, *McCormick on Evidence*, 4th Ed. 1992, § 211, pp. 385-388.) One important aspect is that Bayes' theorem can only be utilized when the accused man definitely has the genes inherited by the child from its father. (Peterson, supra, 22 Santa Clara L. Rev. 667.)

The paternity index then is the ratio of the probability that the accused man contributed the genes divided by the probability the random man would have contributed the genes. (Peterson, supra, 22 Santa Clara L. Rev. 667.)

In the case at bar, the child's father *MUST* have B18, but the best scientific testing currently available is unable to determine with any certainty whether petitioner has B18.

ARGUMENT

I. CALIFORNIA FAMILY CODE § 7555 VIOLATES SUBSTANTIAL DUE PROCESS AND IS THEREFORE UNCONSTITUTIONAL.

California law provides for the shifting of the burden of proof in a paternity action onto the putative father "if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater." (California Family Code § 7555.) A judgment of paternity involves the creation of a parent-child

relationship, the establishment of which must be accomplished by procedures meeting the requisites of the due process clause. California Family Code § 7555 fails to meet the requisites of the due process clause.

A. California Family Code § 7555 Affects Matters of Family Life, Which are Fundamental Liberty Interests Protected by the Fourteenth Amendment.

This court has historically recognized that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. (*Santosky v. Kramer*, 455 U.S. 743, 753, 102 S.Ct. 1388, 1394 (1982); *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 101 S.Ct. 2153 (1981); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845, 97 S.Ct. 2094 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932 (1977) (Plurality Opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640, 94 S.Ct. 791 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652, 92 S.Ct. 1208 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923).) "Just as the termination of such [familial] bonds demands procedural fairness [citation], so too does their imposition." (*Little v. Streater*, 452 U.S. 1, 13, 101 S.Ct. 2202 (1981).)

Any statute which affects a fundamental right must survive strict scrutiny. (*Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976).) Since family life is a fundamental right,

and California Family Code § 7555 affects familial bonds, the statute must be substantially related to a compelling state interest.

B. California Family Code § 7555 is not Substantially Related to a Compelling State Interest.

The burden of proof is often the deciding factor in a paternity proceeding. Our judicial system rests on the foundation that the party bringing the claim must prove every element of that claim to prevail. The accuser is generally not permitted to make the accusation, sit back and let the accused try to prove his innocence. Family Code § 7555 shifts the burden of proof in paternity cases to the defendant. Under Family Code § 7555 the accuser can sit back and let the accused try to prove his innocence.

The California Legislature's stated intent in enacting Family Code § 7555 was:

> . . . to standardize the process by which paternity is established in order to achieve a greater degree of equity and consistency in paternity determinations. The Legislature finds that the signs of genetic testing has advanced to the degree that paternity determinations resulting from such testing are so reliable that the burden of proof can be shifted to the putative father. (Stats. 1986, ch. 629, § 1. pp. 2136-2337.)

The shifting of the burden of proof from the plaintiff, the County in the instant case, to the defendant in order to "achieve a greater degree of equity and consistency" is not substantially related to a compelling state interest.

1. The stated intent for enacting California Family Code § 7555 is not a compelling state interest.

Where a fundamental liberty is concerned, obtaining equity and consistency is not a compelling state interest. Petitioner acknowledges the government's interest to prevent a child from becoming a public charge, and to seek the party responsible for bringing that child into the world, to provide the support. The state also "shares the interest of the child and the defendant in an accurate and just determination of paternity." (*Little v. Streater*, 452 U.S. 1, 14, 101 S.Ct. 2202, *supra*.)

By focusing on "equity and consistency," the statute ignores accuracy. The shifting of the burden of proof reflects a judgment that it does not matter whether the correct father of the child is found, as long as there is a man to provide support for a child. In deciding what standard of proof is necessary in a parental termination case this court in *Santosky v. Kramer*, 455 U.S. 743, 755, *supra*, explained

> Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' [citation] When the State brings a criminal action to deny a defendant liberty or life, however, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as

> possible the likelihood of an erroneous judgment. [citation] This stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impose almost the entire risk of error upon itself.' [citation]
>
> . . .
>
> 'in cases involving individual rights, whether criminal or civil, "the standard of proof [at a minimum] reflects the value society places on individual liberty." ' [citation]
>
> . . .
>
> This court has mandated in an intermediate standard of proof – 'clear and convincing evidence' – when the individual interest at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' [citation] Notwithstanding 'the state's civil labels of good intentions' [citation] the court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.' [citation] (*Santosky v. Kramer*, 455 U.S. 743, 755, 756-757, 102 S.Ct. 1388, *supra*.)

The shifting of the burden of proof in California Family Code § 7555 drastically reduces the degree of proof the state must produce. It is less than that required in a civil dispute over money damages. It places almost the entire risk of error upon the defendant. This court's

holding in *Santosky v. Kramer*, 455 U.S. 743, 102 S.Ct. 1388, that the state must prove its allegations by "clear and convincing evidence" before it can terminate a parent's rights is strongly suggestive that a state must prove that the putative father is the father in a paternity proceeding by "clear and convincing evidence" as well. The same fundamental right is at issue.

The Legislature's desire to obtain equity and consistency in paternity determinations cannot be deemed such a compelling state interest so as to allow the state to shift the risk of error in determining a family matter to a defendant. Fundamental liberties cannot be subordinated for mere convenience. (*Schneider v. Slate*, 308 U.S. 147, 161, 60 S.Ct. 146 (1939).)

2. California Family Code § 7555 is not substantially related to a compelling state interest.

Even if this court were to find that equity and consistency in paternity determinations was a compelling state interest, California Family Code § 7555 is not substantially related to that interest. Where the government is the plaintiff, the shifting of the burden creates such a risk of erroneous results that no equity and consistency is obtained.

Just as in termination actions, putative fathers subject to paternity actions are "often poor, uneducated, or members of minority groups and such proceedings are often vulnerable to judgments based on cultural or class bias." (*Santosky v. Kramer*, 455 U.S. 743, 763, 102 S.Ct. 1388, 1400,

supra.) Just as in termination actions, in paternity actions, the government's

> ability to assemble its case almost inevitably dwarfs the parent's ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given . . . proceeding. . . . The disparity between the adversary's litigation resources is matched by a striking asymmetry in their litigation options. (*Santosky v. Kramer* 455 U.S. 743, 763-764, 102 S.Ct. 1388, 1400, *supra.*)

Instead of creating equity and consistency, the statute creates inequity and inconsistency. Those men without the resources to hire their own experts, and mount their own defense, cannot possibly rebut the presumption created by California Family Code § 7555. Furthermore, nothing stops the state from repeated efforts to establish paternity against any one putative father.

Also, just as was set forth in *Santosky*, the factfinding in a paternity suit by the state to recover welfare benefits "pits the state directly against the" [putative father]. (*Santosky v. Kramer*, 455 U.S. 743, 759, 102 S.Ct. 1388, 1397.) Under the procedural scheme set forth in California Family Code § 7555, all the state must do is provide a blood test showing a paternity index of 100 or greater and it is up to the putative father to disprove that he is the father. The only question the trial court is required to decide is whether the state has produced an expert who has calculated the putative father's paternity index at 100 or greater. If so, the burden shifts.

This court in *Little v. Streater*, 452 U.S. 1, held that Connecticut's statutory scheme of essentially shifting the

burden of proof onto a putative father to prove himself innocent of the accusation that he was the father, and then denied him subsidized blood testing to refute the accusation, was unconstitutional. The statutory scheme which is at issue here is similar. California Family Code § 7555 shifts the burden onto the putative father to prove himself innocent of the accusation. California Family Code § 7557 requires the putative father to pay for any expert services he deems necessary to refute that allegation. California Family Code § 7557 states:

> Nothing in this part prevents a party to an action or proceeding from producing other expert evidence on the matter covered by this part; but, where other expert witnesses are called by a party to the action or proceeding, their fees shall be paid by the party calling them and only ordinary witness fees shall be taxed as costs in the action or proceeding.

As this court stated in *Little v. Streater*, 452 U.S. 1, 12, "such a practice is irreconcilable with the command of the due process clause."

As this court further stated in *Little v. Streater*, 452 U.S. 1, 14 , *supra*,

> the state admittedly has a legitimate interest in the welfare of a child born out of wedlock who is receiving public assistance, as well as in securing support for the child from those legally responsible. In addition, it shares the interest of the child and the defendant in an accurate and just determination of paternity.

California Family Code § 7555's stated objective of "an accurate and just determination of paternity" actually

becomes an objective in favor of a determination of paternity whether or not accurate and just. There is no gain towards equity and consistency in paternity determinations if those determinations are inaccurate. The statute cannot stand.

3. There are other available means to obtain equity and consistency in paternity determinations.

California Family Code § 7552.5 and § 7554 each provide for the admittance into evidence of the blood test results and leave up to the trier-of-fact the determination of the alleged father's paternity, as submitted on all the evidence. This court stated in *Little v. Streater*, 452 U.S. 1, 13, *supra*, "unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute." Given this reality, there is nothing to be gained by the state's shifting the burden onto a putative father to prove his innocence when the paternity index is 100 or greater. The blood tests will be admitted into evidence and the trier-of-fact can decide, upon looking at all the evidence adduced, whether the state has upheld its burden to prove by a preponderance of the evidence that the putative father is the father of the minor child at issue.

II. AS APPLIED IN THIS CASE CALIFORNIA FAMILY CODE § 7555 IS UNCONSTITUTIONAL.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." (*Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).) In *Mathews*, the Court set forth three distinct factors by which due process is to be evaluated:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. (*Mathews v. Eldridge*, 424 U.S. 319, 335, *supra*.)

In addition, this Court in *Lassiter v. Department of Soc. Servs. of Durham Cty.*, 452 U.S. 18 (1981), described substantive due process as:

> [T]he requirement of "fundamental fairness", a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. (*Lassiter v. Department of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 24-25, *supra*.)

California Family Code § 7555 provides for a presumption of paternity that shifts the burden of proof onto a defendant when a computation from the genetic

makeup of the parties exceeds a specified level. Neither the code section, nor the statistical method used pursuant to the code section, make any provision for the possibility that the blood tests are unable to determine with certainty the genetic makeup of the parties, or that the expert is less than 100% certain of the genetic makeup of any of the parties. A review of the legislative history in California reflects that the Legislature was never advised that that possibility exists. In reality it not only exists, but it occurs frequently.

In the case at bar, three perfectly valid test results were obtained from defendant's blood. Two of them indicated that it was possible he could be the father. The third absolutely excluded him. All three were equally valid, and the government's expert so testified.

The government's expert further testified that in her best medical opinion there was a two-thirds, that is 66.67% chance that defendant actually had the necessary gene to be capable of possibly being the father.

Neither California Family Code § 7555, nor the computation made by the expert pursuant to that code section, has any provision for the use of such a probability. In order to compute a probability the expert must use a certainty, that is a 100% probability that a party has a particular gene, or the formula will not work.

In the case at bar the expert, knowing it to be incorrect, inserted a 100% probability that defendant had the necessary B18 gene, despite the test results and her own best medical opinion that there was only a 66.23% probability that he had the gene. The result was to compute an artificially high and erroneous probability that he could

be the father, compared to a random man. It put the burden of disproving paternity onto him, despite the fact that if a computation had been made using the correct information as the government's expert testified, he would have nowhere near reached the threshold for the switch in the burden of proof. In scientific terms the use of the formula is referred to as GIGO (garbage in, garbage out). The court of appeal's approval of such use, which is now the controlling law in the State of California, both deprives defendants, such as petitioner herein, of due process, and totally bastardizes the science of blood testing.

A. The Effect on the Financial and Legal Interests of the Defendant Which Results From a Determination of Paternity is Substantial and Lifelong.

A determination of paternity imposes upon the defendant a lifelong relationship with significant financial, legal and moral dimensions. (*Rivera v. Minnich*, 483 U.S. 574, 584 (1987) (Brennan, dissenting).) In California, the determination results in a ongoing, open-ended support obligation until the child is at least 18. (California Family Code §§ 3900, 4100, 4105, 7641.) The child will also share in the father's estate whether the father dies intestate (Probate Code §§ 221, 222, 255.) or testate, unless affirmatively excluded (Probate Code §§ 6570, 6572.). This financial obligation is enforced by significant legal sanctions. (*Rivera v. Minnich*, 483 U.S. 574, 584, *supra* (Brennan, dissenting).) Failure to comply is more freely enforceable by garnishment than an ordinary civil judgment (15 U.S.C. § 1673(b)(1); Internal Revenue Code,

§ 6103(l)(6); Code of Civil Procedure § 706.030.), and is not dischargeable in bankruptcy (11 U.S.C. § 362(b)(2).). In addition, a failure to pay support is subject to the state court's civil contempt power (Civil Code, § 7641, Family Code, § 3500 et seq., § 3900 et seq., and § 4000 et seq.) and to interstate assistance statutes (42 U.S.C. §§ 651-655; Family Code § 4800 et seq.) Furthermore, failure to satisfy the support obligation may result in incarceration. (California Penal Code, § 270.) Finally, but not least, a finding of paternity can disrupt the defendant's existing family relations, as well as damage the person's reputation. Thus, a paternity determination establishes a legal duty whose assumption exposes the father to the potential loss of both the property and liberty interests protected by due process. (*Rivera v. Minnich*, 483 U.S. 574, 584, *supra* (Brennan, dissenting).)

B. Putting the Burden of Proof onto Defendant, Based on a Computation Which Uses Percentages Contrary to the Undisputed Blood Test Evidence, and Contrary to the Government's Expert's Own Undisputed Opinion is Unconstitutional.

Computation of the paternity index pursuant to California Family Code § 7555 was done in this case by using a 100% probability, that is a certainty, that petitioner had a HLA gene known as B18. It was the undisputed, unchallenged testimony of the government's own expert, Dr. Julita Fong, that in her best medical opinion defendant had only a 66.67% chance of having that gene. If he did not have the gene he could not be the father. Dr. Fong's testimony was based on the blood test results run

by her laboratory, two of which showed that he had the gene and one of which showed conclusively that he did not. Dr. Fong testified that it was not uncommon for these conflicts to occur, as biologics were far less certain than chemical tests, despite what the lay public and the legal profession might believe.

Had Dr. Fong attempted to use the formula that she did, employing the 66.67%, or had she used any other appropriate computation of probability, the burden of proof would not have been shifted upon the defendant.

Dr. Fong, in fact, testified that the chance that defendant had all the necessary genes to be the father was under 50%. Nonetheless, defendant was placed in the position to attempt to disprove his paternity based on events occurring 12 years prior. That creates an impossible burden. This case illustrates the nature of the burden.

To attempt to prove his innocence an accused man would necessarily have to seek out and request blood tests from the other individuals with whom the mother was having sexual intercourse. The mother in this case admitted to several facts concerning her sexual activities at the time of conception. First, she admitted to having sex with four different men. This came from a variety of sworn documents, and testimony she had made over the years. Secondly, she admitted that during that time she was a drug abuser and her memories of who she was sleeping with were rather vague.

In short, petitioner was wholly dependent upon the accusing mother to provide him with the information necessary to exonerate himself, once the burden of proof had been shifted. In the case at bar, the mother refused to

identify one man she had been sleeping with beyond his first name, and refused to divulge the location or any distinguishing characteristics as to a second man. The mother's recalcitrance, coupled with the passage of time, places an impossible burden on petitioner.

To put onto petitioner the burden of proof to disprove his paternity based upon a computation, which itself was inconsistent with the undisputed evidence, is to totally deprive the petitioner of due process. As noted the implications of paternity are serious to petitioner's family life, his property, and even his liberty.

This Court, in *Little v. Streater*, 452 U.S. 1, 13, *supra*, noted the value of scientific blood test evidence when it stated that "[u]nlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute." (*Little v. Streater*, 452 U.S. 1, 13, *supra*.) This Court continued, however, stating that a statute may be held constitutionally invalid as applied if the statute operates to deprive an individual of a protected right, though apparently valid as written. (*Little v. Streater*, 452 U.S. 1, 16, *supra*.)

As a review of the Court of Appeal's opinion (attached hereto at App. 2.) reflects, there is essentially no evidence a healthy accused man can present to rebut the presumption, short of being able to prove that he was not in the country for two months before or after conception. Anything short of that would not meet the standards set forth by the appellate court.

C. The State has no Legitimate Interest in Determining the Wrong Man to be the Father.

The California legislature enacted Family Code § 7555 in order to standardize the process by which paternity is established in order to achieve a greater degree of equity and consistency in paternity determinations (*County of Sonoma v. Grant W.*, 187 Cal. App. 3d 1439, 1447 fn. 3 (1986).). The legislature's desire for equity, however, cannot be achieved by the use of a computation which assumes facts contrary to the evidence. In light of the enormous effect on the financial and legal interests of the defendant, the legislature's desire for consistency cannot possibly outweigh the need for a defendant to receive a determination based on complete, accurate test results. Thus, as applied in this case, Family Code § 7555 violates defendant's due process rights.

III. AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL SECTION 7555 IS REALLY A CONCLUSIVE PRESUMPTION, AND THUS, VIOLATES DUE PROCESS.

As interpreted by the appellate court, California Family Code § 7555's presumption of paternity violates the fairness necessary to satisfy substantive due process. It allows a defendant no real opportunity to rebut the presumption of paternity, and thus, creates an irrebuttable presumption which does not consider the individual circumstances of each paternity case.

California Family Code § 7555 states that a rebuttable presumption of paternity exists, which affects the burden of proof, if the court finds that the paternity index is 100

or greater, if calculated by experts qualified as examiners of genetic markers. The statute continues, stating that a defendant can rebut this presumption of paternity by a preponderance of the evidence. In fact, a defendant's ability to rebut this presumption is merely illusory.

The fundamental fairness necessary to satisfy due process can be determined by first considering any relevant precedents and then by assessing the several interests that are at stake. (*Lassiter v. Department of Soc. Servs. of Durham Cty*, 452 U.S. 18, 24-25, *supra*.) A statute may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right. (*Little v. Streater*, 452 U.S. 1, 16, *supra*.)

In order to satisfy the "preponderance of the evidence standard," the party with the burden must provide evidence that the fact which the party wishes to prove is more likely to exist than not. A requirement to prove a fact absolutely is not required. Evidence, such as that offered by the petitioner in this case, should have successfully rebutted the presumption by a preponderance. The trial court found that it did. Cross-examination of the expert revealed the misapplication of the computation, as the expert acknowledged. The mother's testimony was a maze of contradictions regarding the dates and number of sexual partners. The mother signed numerous documents under penalty of perjury naming various men as the father of the minor in this case. She testified that she went out with petitioner when her boyfriend dropped her because she was already pregnant. From this testimony, the trial court found that any one of the untested men or defendant could be the putative father, and therefore found the presumption rebutted.

The appellate court, however, found that the defendant did not successfully rebut the presumption with this evidence. The court listed three facts which had to be proved by the defendant to rebut the presumption. The facts consist of establishing that the defendant was sterile or impotent, that the defendant did not have sexual intercourse with the mother, or that the "match" found by the State's expert was incorrect.

The appellate court's opinion dismissed the test that exonerated petitioner as erroneous, despite there being no such evidence, and despite the undisputed testimony of the state's expert that it was just as valid as the other tests. The appellate court would require that a putative father furnish evidence that he *absolutely could not have been* the father, by showing that he was physically unable to have sexual intercourse or by showing that he was nowhere near the mother during the period of conception. In this case, petitioner is faulted for not making this proof 12 years after the fact.

Here, the State of California has reserved to itself not a scintilla of risk of error by allowing the paternity index to be calculated without regard to the evidence. California Family Code § 7555 imposes upon the defendant virtually all of the risk. Not only should California have to satisfy a clear and convincing standard to establish paternity, as in *Santosky*, the state should not be able to shift the burden of proof without sound basis. The burden shifts to the defendant the need to disprove the state's accusation, years after the event when, as here, he may have had no knowledge of even potential liability for many years. This shifting of the burden of proof is hardly consistent with this Court's findings regarding

providing fairness to individuals sued by the government outlined in *Santosky*.

The legislature's desire for equitable paternity determinations can be achieved by submitting the issue of paternity to the trier of fact upon all the evidence and offering the paternity index as but one factor to be considered.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

COUNTY OF EL DORADO,

Plaintiff, and Appellant,

v.

BILL MISURA,

Defendant and Respondent.

_____ /

C012199

(Super. Ct. No. SFS0154)

APPEAL from a judgment of the Superior Court of Placer County. Larry Gaddis, Judge. Reversed with directions.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Carol Ann White, Supervising Deputy Attorney General, Mary Jane Hamilton, Deputy Attorney General, for Plaintiff and Appellant.

Howard M. Hoffman for Defendant and Respondent.

A woman has intercourse with several different men and conceives a child. Years later, she identifies one man as the father and blood tests show this man closely matches the genetic characteristics expected of the child's father. By statute, these test results trigger a presumption of paternity. (Fam. Code, § 7555, former Evid. Code, § 895.5.) The other men are not tested. We conclude

evidence of the mere existence of other, untested, men is insufficient of itself to rebut the statutory presumption of paternity based on genetic testing.

The Attorney General prosecutes this appeal from an adverse ruling dismissing a paternity complaint. We construe the premature notice of appeal from this nonappealable ruling to encompass the judgment. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 414, pp. 411-413.) We need address but one of the arguments: whether substantial evidence supports the trial court's decision. On this question we disagree with the reasoning and analysis proffered by the Attorney General, but we agree no substantial evidence supports the judgment. We reserve with directions.

FACTS

The specifics of the testimony will be revisited later, after a discussion of the scientific significance of it. However, to provide context we offer the following precis:

The child was born on October 17, 1982. The mother had sex with defendant around the time of the Pig Bowl, which was played on January 23, 1982, about nine months before. (See fn. 3, *infra*.) The trial court's opinion is muddled on this point, but the statement of facts in defendant's respondent's brief states without qualification that the mother had intercourse with him during the period of conception. Defendant is bound by this concession. (Mangini v. Aerojet-General Corp. (1991) 230 Cal.App.3d 1125, 1152; Federer v. County of Sacramento (1983) 141 Cal.App.3d 184, 186; 9 Witkin, op. cit. supra, § 482, pp. 472-473.) There was evidence that during that period the

mother may have had sex with three other men. Based on certain blood tests, when comparing defendant to a random man there was a 99.69% relative chance he was the father, even assuming the mother had three other sex partners. Defendant's "paternity index" was 970, more than enough to trigger a statutory presumption of paternity.

DISCUSSION

I

Genetic Testing of Blood

Some knowledge of the science underlying genetic testing is necessary to understand the legal issue raised in this case. "In a paternity trial, a fact-finder is naturally tempted to seize upon statistical figures, like the paternity index or the probability of paternity, as lifelines of objective truth in a sea of prevarication. 'Soft' evidence involving difficult questions of credibility and other circumstantial matters may be submerged or lost because it appears unnecessary to resolve the questions in light of the hard, scientific, mathematical proof. Under these circumstances it is absolutely essential that the significance of the mathematical proof be clearly understood by both counsel and the fact-finder." (Peterson, *A Few Things You Should Know About Paternity Tests (But Were Afraid to Ask)* (1982) 22 Santa Clara L.Rev. 667, 684, fn. omitted.)

Through testing of blood and tissue, particularly HLA (human leukocyte [white blood cell] antigen) testing, certain genes can be identified. If a child has a gene not contributed by the mother, it was contributed by the father. If a man could not have contributed the gene, he is not the father. But the converse is not true; merely

because he could have contributed the gene does not prove the man is the father. Thus, genetic testing cannot *establish* paternity; at most it can only preclude paternity. (See Comment, *DNA Fingerprinting and Paternity Testing* (1989) 22 U.C. Davis L.Rev. 609, 614.)

Certain genes are more or less common in given human populations. If the putative father possesses uncommon genes which must have been contributed by the child's father, often it is said there is a greater likelihood or probability he is the true father, expressed as a high paternity index or "probability of paternity." (*DNA Fingerprinting and Paternity Testing*, supra, 22 U.C. Davis L.Rev. at pp. 616-617.) But the assumption misleads. (Peterson, *supra*, 22 Santa Clara L.Rev. at pp. 669, 685.) This "likelihood" exists only because we assume the man had what is obliquely referred to as "access to the mother." (E.g., *In re Paternity of M.J.B.* (Wis. 1988) 425 N.W. 2d 404, 409.) Regardless of the genetic makeup of the putative father, if he is infertile or did not have access to the mother, he is not the father. Without access there can be no paternity. (*Id.* at p. 410.) The trier of fact cannot find a defendant is the father based solely on expert testimony. Such testimony must be coupled with so-called "nongenetic" testimony ("soft" evidence) establishing access.

A joint committee of the American Bar Association and American Medical Association promulgated certain guidelines which, in combination with standards set by the American Association of Blood Banks (AABB), create the backdrop for expert testimony in a particular case. (*Joint AMA-ABA Guidelines; Present Status of Serologic Testing in Problems of Disputed Parentage* (1976) 10 Fam. L.Q.

247 (hereafter *Guidelines*); see generally Walker, Inclusion Probabilities in Parentage Testing (1983).) A brief explanation of certain terms follows.

The *probability of exclusion* (or "prior probability of exclusion") is "the probability that the tests employed will exclude a falsely accused man. If the probability of exclusion with the tests employed is 95%, of 100 non-fathers 95 will be excluded and 5 will not be excluded. . . . This does not mean that there is a 95% chance that the alleged father is the true father. . . . [T]here is no direct relationship between the probability of exclusion and the likelihood of paternity. Likelihood of paternity cannot be extrapolated from the probability of exclusion. . . . The significance of the probability of exclusion is that if he is not excluded as a possible father, the likelihood of paternity can be estimated by considering other available empirical evidence." (*Division of Family Services v. Guffey* (Mo.App. 1990) 795 S.W.2d 546, 548, fn. 2, italics omitted.) Confusingly, a separate "probability of exclusion" is specific for the given mother-child combination. (Peterson, *supra*, 22 Santa Clara L.Rev. at p. 679; see Reisner and Bolk, *A Layman's Guide to the Use of Blood Group Analysis in Paternity Testing* (1981-1982) 20 J. Fam. L. 657, 671 (hereafter *A Layman's Guide*).)

The *paternity index*, sometimes called the "likelihood ratio," or "chance (or likelihood) of paternity," "involves the probability that a cross between the [putative father] and the mother would produce an offspring with the child's phenotypes and the corresponding probability for a random selection of genes from the male population." (Daye, *Plemel* as a Primer on Proving Paternity (1988) 24 Willamette L.Rev. 867, 877 (hereafter *Proving Paternity*).)

"Despite the alternative labels, it is *not* the probability that the accused is the father." (*Plemel v. Walter* (Ore. 1987) 735 P.2d 1209, 1213, italics in original; see *Guffey, supra,* 795 S.W.2d. at p. 549, fn. 2.) The *chance of paternity* is the paternity index converted into a percentage.[1] (*Plemel, supra,* 735 P.2d at p. 1214.) The *probability of paternity* (or "posterior probability of paternity") is the probability the putative father is the true father of the child in question, and is a term often misused and misunderstood. *The probability of paternity must take into account the "soft" or "nongenetic" evidence in the case.* Such "soft" evidence is converted into a figure known as the "prior chance" or "prior probability of paternity." For example, if but one man had access to the mother, his *prior* probability of paternity (the probability of paternity without considering the genetic evidence) would be 100%. His *posterior* probability of paternity (the probability after considering the genetic evidence) would also be 100%, because of the "soft" evidence establishes paternity, regardless of the genetic evidence. If a man had no access to the mother, his prior probability of paternity wold be zero, as would his posterior probability of paternity.

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[1] The Joint AMA-ABA Guidelines attach the labels "practically proved," "extremely likely," "very likely," "likely," "undecided," and "not useful" to various percentage ranges. (See *Guidelines, supra,* 10 Fam. L.Q. at p. 262.) However, "[t]hese terms have no objective scientific status, and supply no information that the probability of paternity does not supply more precisely." (*Proving Paternity, supra,* 24 Willamette L.Rev. at p. 882; see also id. at p. 883 and fn. 62.) At least one court has held such "verbal predicates" are inadmissible, because they are misleading to the fact-finder. (*Plemel, supra,* 735 P.2d at p. 1219; *see id.* at p. 1214, fn. 5.) We agree.

Again, regardless of the genetic evidence, the nongenetic evidence establishes nonpaternity. (*Plemel, supra,* 735 P.2d at p. 1215.)

But the nongenetic evidence is never this simple. In most cases the trier of fact has some evidence of access and some evidence of nonaccess. "Since these absolutes cannot be known, we can estimate these values as 90% for a strong pro-paternity case and 10% for a weak case. Traditionally, laboratories use a neutral figure of 50% in their calculations. When 50% is used, the likelihood of paternity is mathematically identical to the probability of paternity. Hence when laboratories ignore the prior probability they are assuming it is 50%, a figure which may or may not be appropriate." (*A Layman's Guide, supra,* 20 J. Fam. L. at p. 674; see *Proving Paternity, supra,* 24 Willamette L.Rev. at pp. 878-881.)

Use of the 50% figure means it is as likely the putative father has access to the mother as a random man. Some courts view this assumption of equal access as an impermissible evidentiary presumption which deprives the defendant of due process. (See *State v. Skipper* (Conn. 1994) 637 A.2d 1101, 1103-1108 [criminal conviction reversed because testimony assumed intercourse took place]; *In re Paternity of M.J.B., supra,* 425 N.W. 2d at p. 409; but *see State v. Spann* (N.J. 1993) 617 A.2d 247, 253 [no such presumption arose]; *Kammer v. Young* (Md.App. 1988) 535 A.2d 936, 941 [use of equal chance is neutral].) The better practice may be for the expert to testify to a range of prior probabilities, such as 10, 50 and 90 percent, and allow the trier of fact to determine which to use. (*Plemel, supra,* 735 P.2d at p. 1219; *Paternity Testing, supra,* 22 Santa Clara L.Rev. at p. 691, fn. 74; see *M.J.B., supra,*

425 N.W.2d at pp. 410-411; *State v. Jackson* (N.C. 1987) 358 S.E.2d 679, 682; *Kammer, supra,* 535 A.2d at p. 942.)

We need not enter into this quagmire because this precise point is not raised on appeal. But it emphasizes the importance of understanding expert testimony cannot supplant evidence of access; expert testimony must be viewed through the lens provided by the soft evidence. Accordingly, an expert "is unqualified to state that any single figure is the accused's 'probability of paternity' . . . [because] such a statement requires an estimation of the strength of the other evidence presented in the case . . . , an estimation that the expert is in no better position to make than the trier of fact."[2]

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[2] (*Plemel, supra,* 735 P.2d at p. 1217.) An example will help illustrate these concepts. In *Plemel,* the tests showed a prior probability of exclusion of 97.5%. (*Id.* at p. 1211.) The putative father (Walter) had a paternity index of 178. This means "that it is 178 times more likely that a union of Plemel and Walter would produce a child with the observed [genetic] markers than would a union of Plemel and a set of [paired genes] picked at random from men of Walter's race." (*Proving Paternity, supra,* 24 Willamette L.Rev. at p. 874.) This is converted into a chance of paternity of 99.4% (178 divided by 1 + 178 = .9944). (*Ibid.; see Plemel, supra,* 735 P.2d at p. 1214.) Although the expert did not express a probability of paternity of 50%, and the (posterior) probability of paternity was 99.4%. (*Id.* at p. 1215.)

"It can be mathematically shown [*sic*] that the index of a random man is one. Since one random man is equally as likely as another random man to have fathered the child, this conclusion is also intuitively clear. It can also be shown that if more than one man is possibly the father, and if each man is equally as likely to have fathered the child as any other, then the probability that any one of the men is the father is equal to his paternity index divided by the sum of the indices of all of the

With this understanding of the testing nomenclature, we consider the effect of a statute on the meaning of the scientific testing.

II

Presumption of Paternity

The usual paternity suit involves a man, hereafter referred to as the defendant, who does not wish to be declared the father of the child. Because of the accuracy and statistical significance of modern blood testing, the California Legislature has adopted a statutory presumption of paternity. If the defendant's blood test results in a particular numerical score, he is presumed to be the father. Family Code section 7555 (former Evid. Code, § 895.5) provides in relevant part: "(a) There is a rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater. This presumption may be rebutted by a preponderance of the evidence."

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possible fathers." (*Paternity Testing, supra,* 22 Santa Clara L.Rev. at p. 686, fns. omitted.)

A probability of paternity for Walter of 99.4% is determined by dividing his paternity index by the sum of his index plus the random man's index, or 178/(178+1) or .9944. If it were certain two men had access to Plemel besides Walter, Walter's paternity index would still be 178. But the probability of paternity would be 178 divided by 178 plus 2. That would be .9888 or 98.9%. Therefore, in Walter's case, proof of access by two untested other men would not indicate nonpaternity. Even if Plemel had intercourse with five untested men besides Walter, his posterior probability of paternity would still be 97.3% (178/(183) = .9726).

The express legislative intent was "to standardize the process by which paternity is established in order to achieve a greater degree of equity and consistency in paternity determinations. The Legislature finds that the science of genetic testing has advanced to the degree that paternity determinations resulting from such testing are so reliable that the burden of proof can be shifted to the putative father." (Stats. 1986, ch. 629, § 1 pp. 2136-2137.)

III

Rebutting the Presumption

A. The Required Quantity of Proof

The defendant is entitled to introduce other expert testimony. (Fam. Code, § 7557.) Once the statutory presumption is triggered, the court must consider all of the evidence, including any blood test evidence. (Fam. Code, § 7554, subd. (b).) The statutory presumption "may be rebutted by a preponderance of the evidence." (Fam. Code, § 7555, subd. (a).)

The Attorney General argues the statutory presumption is not only triggered by a paternity index of 100, the presumption is strengthened as the index rises. In his view, the degree of proof needed to rebut the presumption rises with the index, requiring a defendant with a very high index to produce "unusually strong contradictory evidence" or "truly extraordinarily strong and reliable evidence." This can be pictured as a line curving asymptotically toward another – ever closer but never reaching. The Attorney General's picture is out of focus: The Legislature has stated the requisite standard of proof

in the statute: Preponderance of the evidence. A man who credibly testifies he is sterile has rebutted the presumption whether his paternity index is 100 or 800. If such testimony is not credible, he has not rebutted the presumption.

B. The Required Quality of Proof

The statute, Family Code section 7555, does not specify what classes of evidence may be used to rebut the presumption. In our view, the defendant may avail himself, *inter alia*, of impeachment and rebuttal of expert testimony.

First, if the defendant introduces evidence the expert testing was conducted improperly, or the wrong gene frequency table was used, or the opposing expert is biased, the defendant may demonstrate his paternity index is not 100 or more. For example, a defendant may prove he is excluded genetically by a test performed by his expert but not considered by the opposing expert or that his paternity index is only 99 or less. Such evidence, if believed, undermines the presumption itself.

Second, the defendant may prove his is infertile or otherwise had no access to the mother during the period of conception. (See *Matter of C.M.C.* (Wisc.App. 1990) 455 N.W.2d 248, 249, 250 [factfinder could find birth control during intercourse established nonaccess].) Such evidence establishes the defendant's prior probability of paternity is zero and, hence, shows nonpaternity.

Third, a defendant might prove another man who had access to the mother also has a high paternity index,

which would raise a competing or "inconsistent" presumption. (See 1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 274, p. 234.) For example, two related men could have access to the mother. (See McCormick on Evidence (4th ed. 1992) Experimental and Scientific Evidence, § 211, pp. 959-960 [Talmudic problem of widow marrying brother in-law too soon and giving birth six months later].) Or a woman may not know with which of two related men she had intercourse. (See, e.g. D. Cronenberg, *Dead Ringers* (1988).) The so-called "hard" scientific testing could result in competing presumptions of paternity which canceled each other out, relegating the trier of fact to the "soft" evidence. (See Teraski, *Resolution by HLA Testing of 1000 Paternity Cases not Excluded by ABO Testing* (1977-1978) 16 J. Fam. L. 543, 549.)

But what if the other man is dead, missing, or unknown? Except in the rare case where he left behind a blood or tissue sample, his paternity index is unknown and hence, no different from the random man's index. For this reason, evidence of access by one untested man does nothing to rebut the statutory presumption. Such evidence does not alter the defendant's paternity index. (See *Proving Paternity*, supra, 24 Willamette L.Rev. at p. 882.) Nor does it change his prior or posterior probabilities of paternity.

The value of "other man" evidence is limited. Tested and excluded "other men" fall out of the equation. A tested, included man may raise a competing presumption if his paternity index is high enough. But in most cases which involve a high paternity index, testimony about an untested man or untested men will not be very important

because proof of access by several untested men may not alter significantly the probability of paternity. (See fn. 2, ¶ 3, *ante*.)

Our conclusion is in accord with *Jones v. Crawford* (Fla.App. 1 Dist. 1989) 552 So.2d 926, wherein the mother testified she has sex with Crawford and another man during the period of conception. The other man was not tested, but Crawford's test showed a 98.23% probability of paternity. Under the Florida statute, this created a rebuttable presumption of paternity. "The trial court recognized the [statutory presumption] but found that [the mother's] credibility was questionable and that [she] received a military allotment from the other man while he was in the service. On these findings, the court ruled that [Crawford] had rebutted the statutory presumption." (552 So.2d at p. 927 fn. omitted.) The Florida appellate court reversed: "In the instant case, [Crawford] failed to meet the burden of overcoming the presumption. [He] did not demonstrate that the HLA test results were erroneous, did not avail himself of the procedures for retesting . . . and did not submit evidence tending to prove that, for any reason (such as sterility or total lack of access), he could not have been the father. Absent such evidence, [his] bare denial and testimony that someone other than [himself] had sexual relations with the mother did not overcome the presumption established by the HLA test results and Section 742.12(1), Florida Statutes (1987)." (*Id.* at p. 928.)

We do not imply that under California law a defendant's "bare denial" of intercourse would be insufficient, even if believed by the trier of fact. But *Jones* is correct insofar as it establishes a defendant must produce some

sort of evidence which rebuts the presumption, and in the usual case, "other man" evidence is not enough.

IV

Factual Showing

Of course, we must view the evidence in the light most favorable to the trial court's ruling. "To be considered substantial, evidence must be of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134, citations and internal marks omitted.) All reasonable inferences must be drawn in favor of the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304; *People v. Johnson* (1980) 26 Cal.3d 557, 562; *Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370.) But "reasonable" inferences do not include those which are contrary to uncontradicted evidence of such a nature that reasonable people would not doubt it. (*Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1168.) And scientific or expert evidence must be evaluated in light of the factors considered and the reasoning employed. (See *Zuckerman, supra,* 189 Cal.App.3d at p. 1135.)

"Under the often-enunciated rule, which is so often forgotten in the enthusiasm of advocacy, we look to the evidence accepted by the trial court." (*Findleton v. Taylor* (1962) 208 Cal.App.2d 651, 652.) We disregard the Attorney General's editorial comments about the facts, such as the repeated reference to the child as "young Johnny," the unsupported claim the mother was badgered in the trial court, and the assumption the defendant must be the

father because he opposed DNA testing of his person. We previously denied the Attorney General's request to consider evidence not introduced at trial. In a supplemental brief, the Attorney General makes further factual assertions which we disregard.

The mother had engaged in intercourse with Bill Krueger in December 1981, but could not remember the last time. Until recently she thought John Utley was the father of the child, "[a]nd the only other person that I had been with at all was Bill Misura, and our first date was the Pig Bowl." She first had sex with defendant the evening of the Pig Bowl.[3] She testified this was around January 22, 1982. She had intercourse with him on one other evening, for a total of five times on two evenings. She had thought she might already be pregnant by Utley, but despite this belief, she later told defendant she was pregnant and he offered to pay for one-half of the abortion costs. After she decided not to abort the child, the mother continued to have intercourse with Utley. She changed her belief about paternity when she received a laboratory report which excluded Utley as the father. In a 1982 child support document, she claimed one "Steve" was the father, but she testified this was a lie. In other documents she claimed Utley was the father.

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[3] The "evening of" the game would be January 22, 1982, as she estimated. We take judicial notice that Pig Bowl VIII was played on January 23, 1982 (Evid. Code, § 452, subd. (h)): The Bacon Bombers (police) beat the Razorbacks (sheriffs) 14-12. (See Sacramento Bee (Jan. 20, 1982) p. C2, (Jan. 24, 1982) pp. B1, C1; Sacramento Union (Jan 23, 1982) p. D1, (Jan. 24, 1982) p. C1.)

To the extent the Attorney General believes no reasonable inference could be drawn the mother had intercourse with other untested men, he is mistaken. From the evidence presented, the trial court could find the mother had intercourse with defendant, Krueger, "Steve" and Utley.

An expert, Dr. Julita Fong, testified Utley was not the father. Defendant had a paternity index, as defined by statute, of 970. "[P]aternity is practically proved."[4] When comparing defendant to a "random man," there was a 99.69% relative chance defendant was the father, even assuming the mother had three other sexual partners. Assuming but one other partner, the relative chance was 99.90%

Defendant did try to prove through cross-examination that he was missing a particular gene which the father had to have, but the evidence included testimony explaining one of the tests was not done correctly and Dr. fong opined defendant did have the gene in question, as reflected on two other runs of the same test.

Although defendant was permitted to produce other expert testimony (Fam. Code § 7557), he did not. Accordingly, the question of paternity was "submitted upon all the evidence, including evidence based upon the tests" in

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[4] When Dr. Fong testified paternity was "practically proved," she was using one of the discredited "verbal predicates" promulgated by the scientific community and was not expressing her belief, as an expert, that it was "practically proved" defendant was the father. (See fn. 1, ante; see also *Plemel, supra*, 735 P.2d at pp. 1214, fn. 5, 1219 [use of this phrase before jury is prohibited].)

accordance with Family Code section 7554, subdivision (b).

On appeal, the parties disagree about the strength of the medical testimony, but the trial court's findings state: "The testimony of Dr. Fong established a rebuttable presumption of paternity regarding the defendant. Her findings are found to be valid and well established in scientific methodology. Her testimony is entirely believable." This finding stands unassailed and therefore with one exception we need not delve further into the complexities of the testimony.

Defendant's principal argument on appeal relates to a snippet of Dr. Fong's testimony: "The trial court stated it found Dr. Fong's testimony entirely believable. Dr. Fong specifically testified that there was only a 46.28% likelihood that respondent had the necessary genes to be capable of fathering this child. . . . This testimony alone is sufficient to uphold the judgment."

We disagree. The trial court's statement that it found Dr. Fong's testimony credible works to defendant's disadvantage, because that testimony, taken as a whole, establishes the requisite paternity index, which the trial court found had been established. The portion of the testimony defendant points to is taken out of context. Dr. Fong testified this 46.28% "likelihood that [defendant] contributed the necessary genes to be the father" must be combined with "how likely it is that a 'random man' would contribute the necessary genes to be the father [in order] to achieve the combined paternity index and the relative chance of paternity." That is consistent with our previous explanation of the need to use a "random man." (See p. 6

& fn. 2, ¶ 2, *ante*.) The trial court specifically asked whether this figure meant there was less than a 50% chance "that [defendant] was in fact the person that contributed the gene," to which Dr. Fong replied no. If and only if Dr. Fong ignored the "random man," which accounts for the frequency of genes in the relevant population, would the number bear the meaning defendant attributes to it.

Because Utley is excluded by the medical evidence, which the trial court accepted, we are concerned only with the other two men, "Steve" and Krueger, plus a "random" man. When Dr. Fong testified defendant has a 99.69% chance of being the father, she assumed it was equally likely all four men (defendant, "Steve," Krueger and the random man) were the father. The paternity index, divided by the paternity index plus three ("Steve," Krueger, and the random man) equals the (posterior) probability of paternity. (See fn. 2, ¶ 2, *ante*.) In this case, 970 divided by 973 equals 99.69%, as Dr. Fong testified. Thus, given that the trial court credited the medical testimony, the presence of other, untested men does not aid in rebutting the presumption.

The trial court found "the testimony of and documentary evidence presented through [the mother] causes the court to find that the presumption of paternity has been rebutted by a preponderance of the evidence. [¶] Significant factors considered were the great number of conflicting statements regarding sexual partners by [mother] and the great passage of time which contributed to failure of memory and conflicting statements about dates and times."

We do not construe the court's findings to mean it disbelieved the mother's testimony she had intercourse with defendant during the period of conception. The court stated at the outset the mother had had "casual relations" (i.e., sexual congress) with defendant, Utley, and Krueger, but that she was imprecise about when. Unless the court believed defendant had access to the mother, it had no cause to invoke the presumption. (See pp. 4-5, 7, *ante*.) Moreover, as stated earlier, defendant concedes he did have intercourse with the mother during the period of conception. We infer the court found "Steve" existed. Assuming Utley is excluded as the father, the record shows the father could be Bill Krueger, "Steve," or defendant. Viewing the evidence in the light most favorable to the judgment, each of these men had sexual congress with the mother around the time of conception.

The trial court took the view the mother's conflicting statements and poor memory of dates means it is *equally likely* any of these men could be the father, and therefore the presumption was rebutted. However, the putative father bore the burden to rebut the presumption of paternity. Therefore as a matter of law it was not equally likely any of the men could be the father. Due to the results of the genetic testing, which established a paternity index of 970, defendant was presumed the father. Defendant produced no evidence of impotence or sterility, no evidence he did not have sexual congress with the mother (in fact, he concedes that he did), and no expert evidence controverting the "match" found by Dr. Fong. He produced no evidence that any other man who had access to the mother during the period of conception had been tested

and found to have a "match." The evidence left is that the mother had sex with two untested, unexcluded, men during the period of conception. This evidence is insufficient to rebut by a preponderance of the evidence the statutory presumption of paternity.

V

Conclusion

The trial court's finding is irreconcilable with the facts. Defendant had intercourse with the mother during the period of conception and has more than the necessary blood characteristics to trigger the statutory presumption of paternity. The trial court accepted the medical evidence. The trial court's conclusion the existence of other, untested men rebutted the presumption is not correct. Although the mother had difficulty remembering when she had intercourse with which men, that does not affect the fact she had intercourse with defendant during the period of conception and does not rebut the presumption. The statutory presumption stands unrebutted. Defendant is the father.

DISPOSITION

The judgment is reversed with directions to the trial court to enter a judgment of paternity. Costs to appellant.

(CERTIFIED FOR PUBLICATION.)

NICHOLSON, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

COUNTY OF EL DORADO, Plaintiff and Appellant, v. BILL MISURA, Defendant and Respondent. _____ /	C017199 (Super. Ct. No. SFS0154) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

The opinion of this court filed March 15, 1995, in the above-entitled cases is modified as follows:

1. On page four, line eight, insert the word "alone" after the word "testing." Replace the semicolon following the work [sic] "paternity" with a period. Insert "By itself," before the words "at most it . . . " to begin a new sentence.

2. On page 11, delete the last two sentences of the page.

3. On page 17, line 18, delete the words "not done correctly" and replace with "invalid."

This modification does not affect the judgment.

The petition for rehearing is denied.

(CERTIFIED FOR PUBLICATION.)

THE COURT:

BLEASE, Acting P.J.

NICHOLSON, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

COUNTY OF EL DORADO, et al.,

Plaintiffs,

vs.

BILL MISURA,

Defendant.

_____ /

C017199

(Super. Ct. No. SFS0154)

STATEMENT OF DECISION

This short cause trial was heard on October 25, 1993. Present were Ms. Robin Haffner, Deputy District Attorney representing the County of El Dorado and Mr. Howard Hoffman representing the defendant, Bill Misura. The issue to be resolved is the alleged paternity of the defendant. The minor in question was born on October 17, 1982 to Ms. Kasey Campbell.

Testimony showed that Ms. Campbell, during the time of conception, was involved in a casual relationship with the defendant, with a Mr. John Utley, and possibly a Mr. Bill Krueger. Based upon the significant passage of time since 1981-82, Ms. Campbell's recollection of the exact dates she may have engaged in sexual relations with these men was less than clear. Testimony showed that she had, at various times, on various documents, claimed different men as the natural father of her son. She testified that Mr. Utley was apparently later excluded by blood testing as a possible biological father. Mr. Krueger and another man described only as "Steve" on

documents which Ms. Campbell completed under penalty of perjury, were never tested for possible paternity.

The testimony of Dr. Fong established a rebuttal presumption of paternity regarding the defendant. Her findings are found to be valid and well established in scientific methodology. Her testimony is entirely believable.

Even considering the presence of the necessary amount of genetic markers found to validate Dr. Fong's finding, the court does find that the testimony of and documentary evidence presented through Ms. Campbell causes the court to find that the presumption of paternity has been rebutted by a preponderance of the evidence.

Significant factors considered were the great number of conflicting statements regarding sexual partners by Ms. Campbell, and the great passage of time which contributed to failure of memory and conflicting statements about dates and times.

The complaint to establish paternity is hereby dismissed.

Dated: October 26, 1993.

/s/
LARRY D. GADDIS
Judge of the Superior Court

Third Appellate District No. C017199
S046199

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF EL DORADO, Appellant

v.

BILL MISURA, Respondent

Respondent's petition for review DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Lucas
Chief Justice

Supreme Court, U.S.
FILED
JAN 11 1996
OFFICE OF THE CLERK

No. 95-747

In The

Supreme Court of the United States

October Term, 1995

BILL MISURA,

Petitioner,

v.

COUNTY OF EL DORADO, on behalf of JOHNNY FLETCHER WOODS, a minor child,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

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QUESTIONS PRESENTED

1. Whether California Family Code § 7555 violated substantial due process and is therefore unconstitutional.

2. Whether as applied in this case California Family Code § 7555 is unconstitutional.

3. Whether as interpreted by the California Court of Appeal, § 7555 is really a conclusive presumption, and thus, violates due process.

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Respondents El Dorado County, California, respectfully request that this Court deny the petition of Bill Misura for a writ of certiorari seeking review of the opinion of the Court of Appeal of the State of California, Third Appellate District.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction because petitioner never properly raised the constitutional question of due process below, as required by 28 U.S.C. § 1257(a).

This Court also lacks jurisdiction because the state appellate decision rests on an adequate and independent state law ground.

STATEMENT OF THE CASE

Respondents incorporate by reference the facts as stated by the California Court of Appeal's decision below. Pet. App. pp. 2-21. See Robert L. Stern et al., Supreme Court Practice 373 (7th ed., 1991) (approving this practice).

REASONS FOR DENYING THE WRIT

The writ should be denied because the constitutional question of due process was never properly raised below as required by 28 U.S.C. § 1257(a) and was, accordingly

never addressed by the state court. In addition, the decision below is not reviewable because it rests on an adequate and independent state law ground: California's paternity-index-presumption statute, i.e., California Family Code § 7555.

Finally, even if these two critical jurisdictional defects did not exist, review should be denied because the court correctly applied the constitutionally-adequate California statute, and petitioner offered no evidence below by way of expert testimony, etc., which provided any basis for his present challenge to the accuracy of the blood tests relied upon to trigger the paternity-index presumption.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE THE CONSTITUTIONAL QUESTION OF "DUE PROCESS" WAS NEVER PROPERLY RAISED BELOW AND, ACCORDINGLY, WAS NEVER ADDRESSED BY THE STATE COURT.

Title 28 U.S.C. § 1257 expressly limits this Court's review of state court decisions to cases where a federal question is involved. 28 U.S.C. § 1257(a).

Petitioner conspicuously fails to address this basic, threshold jurisdictional requirement. This is not a mere technicality. It is fatal to his petition.

Before this Court may entertain an appeal from a state court, Supreme Court Rule 14.1(h) requires the petitioner to state:

> " . . . *the stage in the proceedings,* both in the court of first instance and in the appellate courts, *at which the federal questions sought to be reviewed were raised;* the method or manner of raising them and *the way in which they were passed upon by those courts.* . . . " (Emphasis added.)

In interpreting these requirements, this Court has held that a petitioner has the burden of establishing that the federal question was timely and properly raised in the state court proceeding. *Godchaux Co. v. Estopinal,* 251 U.S.179, 181 (1919); *Beck v. Washington,* 369 U.S. 541, 550-554 (1962). A failure to observe state procedural rules for the raising of constitutional questions requires dismissal of the petition. *In re Lamkin,* 355 U.S. 59 (1957). This Court has also held that the federal claim must have both been raised *and decided* by the state court. *Whitney v. California,* 274 U.S. 357, 360 (1927). This Court has declined to decide an issue which this Court itself had framed but which was not presented to the state courts which, accordingly, did not address it as framed by this Court. *Illinois v. Gates,* 462 U.S. 213, 217 (1982).

In this case, it is undisputed that petitioner did not raise the due process issue before the trial level. Nor did he raise the issue in his briefs before the California Court of Appeal, Third Appellate District. Pet. App. pp. 1-23. It was only in his petition for review before the California Supreme Court that he raised a due process issue at all, and then only in the sense that he contended his due process rights had been violated because the underlying paternity testing which had triggered the paternity presumption in his case, was unreliable, allegedly being flawed in the scientific sense. The California Supreme

Court summarily denied review. Thus, it did not decide the due process issue in either of the forms petitioner now presents to this Court, i.e., that California's paternity-index-presumption statute (§ 7555) qua statute, is repugnant to the Constitution's due process clause; or, in the alternative, the manner in which this paternity-index-presumption statute was applied in his individual case, violated his constitutional right to due process. Pet. App. p. 26.

This means that a critical requirement for the exercise of this Court's jurisdiction under Rule 14.1(h), i.e., a final state court decision on the merits of the due process issue, is missing. By not properly raising it before the California courts, petitioner is deemed to have waived his right to raise the due process issue before this Court.

There being no proper basis for this Court to take jurisdiction over the issues raised, the petition must be denied in its entirety.

II.

THE STATE COURT'S DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Even if this Court were to find that the question of due process had been adequately raised below, review by this Court would still be unwarranted because the decision is fully supported on an independent state ground: California Family Code § 7555 is not repugnant to the Fifth and Fourteenth Amendments to the Constitution and as applied to petitioner by the California Court of Appeal, Third Appellate District, did not operate so as to

deprive petitioner of his constitutional right to due process.

A. California Family Code § 7555 As Drafted Does Not Violate Substantial Due Process

In furtherance of a public policy in favor of the establishment of the parent and child relationship, the California legislature enacted a presumption of paternity affecting the burden of proof in any paternity case where the paternity index is 100 or greater.

In California, blood tests have long been considered conclusive in their showing of *nonpaternity*. California Evidence Code § 895. *Cramer v. Morrison*, 88 Cal.App.3d 873 (1979), held that then-newly developed blood testing results were to be admitted to *establish paternity* because they comprised highly probative scientific evidence on the issue of paternity and it was beneficial to establish the paternity of each and every child born. *Id.* p. 885. In 1986, the California Legislature enacted Evidence Code § 895.5 (the present California Family Code § 7555) which moved beyond the simple admissibility of blood test evidence to establish paternity and created this outright presumption of paternity whenever blood tests yield a so-called "paternity index" over 100. Cal. Stats. 1986, ch. 629, § 1. In 1992, the Legislature modified the language of section 895.5 to its present form so as to include so-called DNA tests within its scope. Cal. Stats. 1992, ch. 851, § 3.

This paternity-index-presumption was originally California Evidence Code § 895.5. When California initiated its new Family Code, effective January 1, 1994, the section became California Family Code § 7555. It provides in part

that there "is a rebuttable presumption, affecting the burden of proof, of paternity, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater." California Family Code § 7555. The presumption may be rebutted by a preponderance of the evidence. California Family Code § 7555. It is a presumption affecting the burden of proof. California Evidence Code § 606 provides that the "effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

This paternity-index-presumption statute is not repugnant to the Fifth and Fourteenth Amendments of the Constitution. It furthers the public policy of establishing every child's paternity. It safeguards the alleged father's right to present evidence to rebut the presumption, such as flawed test results, sterility, impotency, lack of access to the mother, etc. It guarantees the alleged father the right to have his day in court and to present such evidence which by a simple "preponderance" will overcome the scientific testing results.

Nothing more is constitutionally required of the statute.

B. California Family Code § 7555 Was Not Applied To Petitioner In This Case So As To Violate His Due Process Rights

Petitioner's paternity index was found by the experts to be 970, i.e., well beyond the paternity index of 100 required to trigger the statutory presumption. These

results were known well before his civil trial. Petitioner could have petitioned the court for re-testing (and even, more sophisticated testing) had the blood test results been suspicious. Petitioner did not so petition.

The doctor who had performed the blood-testing testified at the paternity trial. Petitioner cross-examined the doctor at length. Petitioner had an opportunity to present an opposing blood-test expert but did not do so. The court found the doctor credible and the results reliable.

The child's mother testified that she and petitioner had had sexual contact.

Petitioner did not take the stand or otherwise offer evidence of his sterility, impotency, or lack of access to the mother, etc.

In other words, petitioner had notice and the opportunity to be heard. The evidence he offered was simply insufficient to establish his non-paternity. Evidence that "other men" indisputably also had sexual access to the mother – without more – is insufficient to overcome the combined evidence of the scientific tests with the mother's unrebutted testimony of sexual intercourse between herself and petitioner. That is what the California Court of Appeal, Third Appellate District found when it reversed the trial court's finding of non-paternity.

Petitioner's due process rights were not violated by this process. Given the present day accuracy of blood genetic marker tests, it is not necessary for the law to require the mother or the child (or the public authorities on behalf of the child) to locate all possible "other men" and to exclude them from paternity before the paternity

of one of the alleged fathers can be affirmatively established.

III.

CALIFORNIA FAMILY CODE § 7555 CREATES A REBUTTABLE PRESUMPTION: THE CALIFORNIA COURT OF APPEAL DID NOT APPLY IT AS A CONCLUSIVE PRESUMPTION AND DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS.

Finally, petitioner argues that the paternity-index-presumption statute (California Family Code § 7555) *as applied to him* by the appellate court operated as a *conclusive* presumption and any such conclusive presumption violates his due process rights.

This is not correct.

This Court in *Michael H. et al. v. Gerald D.*, 491 U.S. 110 (1989), examined the bona fide conclusive presumption of paternity contained in California Family Code § 7540 (formerly California Evidence Code § 621). This Court did not find that that conclusive presumption violated an alleged father's due process rights. *Id.* pp. 119-130.

Here, too, even if petitioner could prevail on the issue that the California Court of Appeal, Third Appellate District, applied the rebuttable paternity-index-presumption statute (California Family Code § 7555) in such a way that it operated in his case as a *conclusive* presumption, that fact does not stand for the proposition that petitioner's constitutional right to due process was ipso facto, violated.

Something more is needed. Petitioner does not even argue that "something more" was at issue here. Petitioner is correct because there simply is no question here but that petitioner had timely notice of the paternity action at issue and that, although he declined to introduce his own expert and/or to take the stand and testify himself, he had his day in court where he had full opportunity to present any and all relevant evidence and to be heard by a court of law.

In sum, even if petitioner had properly raised the due process issue below, certiorari would not be warranted because the decision of the California Court of Appeal, Third Appellate District, was fully consistent with this Court's precedent in *Michael H.*

CONCLUSION

Petitioner having failed to comply with the requirements of Supreme Court Rule 14.1(h), and there being no state court judgment or decision regarding the merits of the questions raised in this petition, the petition should be denied.

Dated: January 11, 1996

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

No. 95-747

In The

Supreme Court of the United States

October Term, 1995

BILL MISURA,

Petitioner,

v.

COUNTY OF EL DORADO, on behalf of JOHNNY FLETCHER WOODS, a minor child,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Third Appellate District

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QUESTIONS PRESENTED

I. WHETHER CALIFORNIA FAMILY CODE § 7555 VIOLATES SUBSTANTIAL DUE PROCESS AND IS THEREFORE UNCONSTITUTIONAL.

II. WHETHER AS APPLIED IN THIS CASE CALIFORNIA FAMILY CODE § 7555 IS UNCONSTITUTIONAL.

III. WHETHER AS INTERPRETED BY THE CALIFORNIA COURT OF APPEAL SECTION 7555 IS REALLY A CONCLUSIVE PRESUMPTION, AND THUS, VIOLATES DUE PROCESS.

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I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. § 1257 states in pertinent part:

> (a) Final judgments or decree rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States. . . .

This case involves the validity of a state statute on the grounds of its being repugnant to the Constitution. Petitioner asserts that California Family Code § 7555 is unconstitutional, in general, and as it was applied in this case.

The issue was first raised by petitioner in the trial court, in a motion in limine to exclude evidence not of the blood test, but of the computation, upon which the paternity index is computed. (C.T. 66-74.) Initially the court reserved its ruling on this motion. (C.T. 75.) It later overruled petitioner's objection to the admission of the computation, and invoked California Family Code § 7555. (App. 25.)

Petitioner prevailed in the trial court. Respondent appealed. Respondent's appeal did not raise the constitutional issue of California Family Code § 7555. The appellate court reversed on grounds not raised by respondent in its appeal. The appellate court, on its own, decided the

case based on its definition of the quantity, and quality of proof necessary to rebut the presumption. (App. 1-20.)

In a Petition for Rehearing to the appellate court, petitioner raised the issue of the unreliability of the assumptions used to compute the paternity index. The Petition for Rehearing was denied. (App. 22.)

Petitioner then brought a Petition for Review in the California Supreme Court. Petitioner raised the issues of the constitutionality of California Family Code § 7555 and its violation of due process. The California Supreme Court denied review, although two Justices voted to hear the case. (App. 26.)

The jurisdiction of the United States Supreme Court does not depend on whether the state court addressed the federal question. It is enough that the federal claim was made and not accepted. (*Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986).) Furthermore, when the California Supreme Court denies a Petition for Review, it is to be assumed that the court has been given fair opportunity to review the merits of the petitioner's claim, for purposes of exhaustion of state court remedies. (*Roman v. Estelle*, 917 F.2d 1505 (9th Cir. 1990).) The issue has been raised, preserved, and passed upon by the California Supreme Court.

Respondent's claim that this court does not have jurisdiction of this petition is erroneous. This court has jurisdiction under 28 U.S.C. § 1257 because petitioner exhausted his state court remedies on the issues raised by this petition.

II. THE STATE COURT'S DECISION IS VALID IF, AND ONLY IF, CALIFORNIA FAMILY CODE § 7555 IS VALID.

The court invoked California Family Code § 7555. This statute shifted the burden of proof onto petitioner to prove he was not the father of the child. The decision is only valid if California Family Code § 7555 is valid. If California Family Code § 7555 is found to be unconstitutional, the decision cannot stand. There is no adequate, independent state ground for the state court's decision to remain valid.

California Family Code § 7555 shifts the burden of proof to a putative father to disprove his paternity. (California Family Code § 7555.) California Family Code § 7555 affects the fundamental right of familial bonds, and therefore must be substantially related to a compelling state interest. The state interest which the Legislature cited in enacting California Family Code § 7555 was to "achieve a greater degree of equity and consistency" in paternity determinations. Far from achieving "equity and consistency," the statute invites error. By shifting the burden of proof on to putative fathers, the statute places almost the entire risk of error upon the accused man. Where familial bonds are concerned, obtaining equity and consistency in paternity determinations, is not such a compelling state interest so as to allow the state to shift the risk of error onto a putative father. The statute is not constitutionally valid.

The appellate court in this case violated petitioner's due process rights by applying the presumption codified in California Family Code § 7555 based upon a paternity

index, whose computation the state's own, and only, expert testified was improperly calculated. At the direction of the government, the state's expert computed the index by omitting a perfectly valid test that she had run, that categorically and absolutely excluded petitioner from possibly being the father of the minor child. The state's expert testified that, based on her test that she was uncertain whether or not petitioner had the necessary gene to be the father. She testified that her expert opinion was that there was less than two-thirds chance that he could have the necessary gene. She further testified that a computation based on lack of certainty of the necessary gene would not yield a paternity index sufficient to trigger the Family Code § 7555 presumption. The computation of the index in this case, had been done, against her best expert opinion, by ignoring the perfectly valid test she had run.

The court's invoking the presumption of California Family Code § 7555 in such a situation, and thereby shifting the burden of proof onto petitioner, was a violation of his due process rights. This violation of due process was made particularly egregious by the extraordinary proof required by the appellate court to rebut the presumption.

III. CALIFORNIA FAMILY CODE SECTION 7555'S PRESUMPTION OF PATERNITY VIOLATES SUBSTANTIVE DUE PROCESS.

Respondent's reliance on *Michael H., et al. v. Gerald D.*, 491 U.S. 110 (1989) is inappropriate. It is not relevant. In *Michael H., et al. v. Gerald D.*, 491 U.S. 110, *supra*, a

putative father brought suit to establish his paternity of a child born in wedlock. The husband was listed on the birth certificate as the father and had always claimed the child as his daughter. This court held that California Evidence Code § 621 did not violate the putative father's due process rights by foreclosing him from establishing paternity, because of the constitutionally protected fundamental interest in the marital family relationship. Appellant agrees that the marital family relationship is a protected interest which should not be violated by a putative father's request to break up the family unit.

This action was brought by respondent against petitioner to prove his paternity of a child born out of wedlock 12 years earlier. The child's mother admitted to having sexual relations with at least four different men during the time of conception. Only one of these men was tested and excluded. She also admitted to extensive drug use which made her memory of the time period of conception hazy, and her list of sexual partners incomplete.

The blood test was, at best, inconclusive according to respondent's own expert.

The California Court of Appeal held that evidence of the other sexual partners was insufficient to rebut the presumption of California Family Code § 7555 it had applied. As interpreted by the California Court of Appeal, in order to rebut the presumption of California Family Code § 7555, petitioner was required to provide evidence that it was impossible for him to have been the father, by showing that at the time of conception (12 years prior) he was physically unable to father a child, or by

proving that he was nowhere near the mother during the period of conception.

This level of proof when the events occurred 12 years before trial, and petitioner had no notice of the accusation for most of that time,[1] in essence, causes California Family Code § 7555 to be a conclusive presumption. Since California Family Code § 7555 involves the imposition of a familial relationship, the same constitutional protection which upheld California Evidence Code § 621 in *Michael H.*, should apply.

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[1] The mother first brought a paternity case against another man, asserting he was the only one with whom she had sexual contact. Only after that effort failed, many years later, did she assert a claim against petitioner.

CONCLUSION

This case presents serious due process issues concerning a statute invoked in thousands of cases annually in California. Petitioner respectfully requests this court grant Certiorari to review the issues.

Respectfully submitted,

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